In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-595

JERRY HOWARD SIMPKINS AND JESSE HOWARD SIMPKINS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were improperly limited in cross-examining a government witness, that they were denied their right to a speedy trial, and that they were prejudiced by the trial court's admonitions to defense counsel.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted on eight counts of interstate transportation of stolen vehicles and other stolen property, in violation of 18 U.S.C. 2312 and 2314. Jerry Howard Simpkins was sentenced to a term of three years imprisonment, all but six months of which was suspended, with three years' probation. Jesse Howard Simpkins was given a term of three years' probation, and fined $5,000. The court of appeals affirmed in a thorough opinion (Pet. App.).

The government's case was based principally upon the testimony of Ellen O'Meara, who was the intermediary between petitioners and members of a New York organized crime ring. Ms. O'Meara explained in detail her dealings with the Simpkinses in procuring stolen automobiles and machinery for them, preparing bogus bills of sale and invoices at their direction, and collecting money they owed to the New York connections (Tr. 399-445).

1. Petitioner's contention that the trial court improperly limited their cross-examination of Ms. O'Meara is insubstantial.

On cross-examination, defense counsel inquired into the names of the members of the theft ring. O'Meara refused to answer, explaining that her life would be endangered if she answered those inquiries (Tr. 446-447). The trial court sustained a subsequent objection to the question because it was irrelevant to the issue at hand, *i.e.*, whether or not the vehicles and machines were transported in interstate commerce by petitioners and whether, at the time they were transported, petitioners knew they were stolen (Tr. 521-523).

The government never contended, and the evidence did not show, that petitioners dealt with any of the main figures in the organized crime ring other than O'Meara. Trial testimony did reveal that petitioners did not know many of the members of the ring (Tr. 483), but that they had had some contact with Gary Melius, Artie Dome, and an individual named Pauley (Tr. 416, 436, 450). These people were involved in delivering the automobiles and machinery. Petitioners contend that the names of others were relevant because they could use these unknown persons to prove they had no knowledge the goods were stolen and did not know with whom they were dealing. However, in endorsing the trial court's action, the court of appeals properly ruled (Pet. App. A5):

> * * * [T]he scope of cross-examination is generally within the discretion of the trial court and usually limited to matters brought out on direct. See *United States* v. *Williams*, 478 F.2d 369, 371 (4th Cir. 1973); *United States* v. *Chase*, 372 F.2d 453, 463 (4th Cir. 1967). But, in any event, we note that the defendants did not attempt to use as witnesses those crime ring members who *were* named by Miss O'Meara. They have given us no reason to believe that they would have used the unnamed criminal members. We are of the opinion the district court acted within its discretion in not requiring the witness to divulge names of persons not directly involved with the crime charged, and whose testimony, if available, could be of little or no value to the defense. In addition, any error committed was harmless. We have had brought to our attention no potential witness with whom the defendants dealt who could not have been subpoenaed. [Emphasis added.]

2. There is no merit to petitioners' contention that the trial court's admonitions to their attorney denied them a fair trial.

On several occasions during the hotly contested, four-day trial, Judge Kellam admonished defense counsel to state his questions in proper form, to refrain from commenting on the evidence, and generally to upgrade his trial tactics (Tr. 473, 508-510, 523-524).

The most critical exchange between the court and the attorney occurred when the court interrupted a question the attorney was directing toward a witness during cross-examination, and advised the attorney that he was testifying and that the form of the question was improper. Shouting in protest, the attorney declared that the pros-

ecution had not objected to his form of questioning and that, in essence, he was not able properly to cross-examine the witness (Tr. 816-817). The court then admonished him as follows (Tr. 817-818):

> * * * [I]f you will conduct yourself as a lawyer should conduct himself in a courtroom, you will receive every consideration. If you do not wish to proceed in that manner, then you will not receive every consideration; and there's no reason for you to raise your voice to the jury or this Court.

During its instructions to the jury on the following day, the court advised the jury that its comments directed toward counsel should not be taken as any indication that it felt the defendants were or were not guilty, nor should the jury attempt to reward or punish the defendants because of any such incidents (Tr. 916-917).[1]

The court of appeals, upon whose opinion we rely, properly ruled that there had been no prejudice to the defendants (Pet. App. A7):

> The trial court has a duty to see that the facts are developed and the jury not left confused. The court here acted within its discretion in warning counsel to desist from what it considered to be unnecessary actions. None of the court's comments were directed to the defendants' credibility or the strength of their case. The case against them was not a weak one, and the court's instructions to the jury were sufficient to correct any prejudice which might have resulted because of its comments to counsel.

---

[1]At the beginning of the trial, as well, Judge Kellam advised the jury that they should not be affected by vigorous courtroom interchanges (Tr. 22-23).

See *United States* v. *Weiss*, 491 F.2d 460 (C.A. 2), certiorari denied, No. 73-1736, October 15, 1974; *United States* v. *Boatner*, 478 F.2d 737 (C.A. 2), certiorari denied, 414 U.S. 848.

3. The claim that petitioners were denied their right to a speedy trial is also without foundation.

Petitioners were originally indicted on November 8, 1971 (Transcript of April 2, 1973, hearing on motion to dismiss, p. 4). A four day continuance was granted on March 9, 1972, because the key government witness, Ellen O'Meara, had for the first time requested a grant of immunity. The case was continued with the agreement of defense counsel on March 13, 1972, because the government had not had sufficient time to obtain immunity for Ms. O'Meara and because defense counsel was ill (Transcript of April 17, 1973, hearing on motion to dismiss, pp. 41-42). The immunity request was finally approved on July 10, 1972. The government was then unable to locate Ms. O'Meara until September 1972, when she was found to be incarcerated in a New York state prison; it was, however, impossible to obtain her release on a writ of *habeas corpus ad testificandum* from New York State officials until the March 1973 term of grand jury, when petitioners were reindicted[2] (Transcript of April 2, 1973, hearing on motion to dismiss, pp. 6-7).

The trial on the superseding indictment commenced on May 24, 1973, the original indictment having been dismissed without prejudice on April 2, 1973.

---

[2]The government's efforts to locate Ms. O'Meara began in June 1972, before immunity was secured for her. From October 1972, the government sought to obtain her from New York State penal authorities, who initially requested that she be extradited.

During this time, petitioners' attorney had written two letters to the Assistant United States Attorney in charge of the case and had conversed with him several times, requesting that the indictments be dismissed. No request for a speedy trial was made to the court until the April 2, 1973, hearing on the motion to dismiss (April 2 Tr., pp. 8, 10). During this period, petitioners were free on personal recognizance (*id.* at 5).

In *Barker* v. *Wingo,* 407 U.S. 514, this Court held that four factors are to be considered in determining whether the right to speedy trial has been violated: (1) the length of the delay; (2) reasons for the delay; (3) the defendants' responsiblity to assert their right; and (4) prejudice suffered due to the delay. Consideration of those factors in light of the facts of this case shows that petitioners were not denied their right to a speedy trial.

The delay was not unreasonably long in light of the reasons for it. The 18-month period between the original indictment and the trial was not wholly attributable to the government. From November 1971 to March 1972, a period of four months, and from March 1973 to May 1973, a period of two months, the cases were moving routinely from indictment through arraignment and to trial. The early 45-day continuance was agreed to by defense counsel and occasioned in part by his illness. The remaining period—slightly less than 11 months—of the delay was primarily due to the government's inability to locate and obtain the surrender of Ms. O'Meara. The circumstances here could not have been changed, nor the case expedited, regardless of the priority assigned to the matter or the urgency accorded it by the United States Attorney. See *Pitts* v. *North Carolina*, 395 F.2d 182 (C.A. 4).

Petitioners did not assert their right to a speedy trial until April 2, 1973. The earlier letters and phone calls to the prosecutor were essentially attempts to obtain a dismissal of the indictment.[3]

Finally, as both courts below found, "no prejudice was shown in any event as [petitioners] had not been incarcerated or otherwise suffered any material damage to their defense" (Pet. App. A3).[4]

---

[3]The letters sent to the prosecutor (Appendix to petitioners' brief in the court of appeals, p. 21) indicate that petitioners wanted the government to follow the course of the first indictment against a then co-defendant, Jack Booher, by dismissing the indictment and foregoing prosecution. They only asserted their speedy trial rights when, at arraignment on the re-indictment, they knew that Booher had also been re-indicted and would be prosecuted. This may account for the fact that a request was not made to the court until the April 2, 1973, hearing.

[4]Petitioners contend that the delay "saw the death of two witnesses material to the defense" (Pet. 8). The witnesses were petitioner Jesse Simpkins' mother and one Howard Strickland.

Petitioners' version of what Strickland would have testified is set out in the transcript of the April 17, 1973, hearing on the motion to dismiss at 19-22. In denying that motion, the trial judge correctly concluded, "I doubt seriously that [Strickland's] testimony would have been of any consequence." *Id.* at 58.

As to the mother, Mrs. Hattie G. Simpkins, petitioners apparently never intended to call her for the trial scheduled on March 9, 1972, or at any other time. She was not subpoenaed for the original trial date, although another family member who was expected to testify was subpoenaed. *Id.* at 47.

Mrs. Simpkins, who was in her seventies, suffered a stroke in August 1970, and remained in the hospital constantly until her death on January 1, 1973. Had petitioners actually wanted Mrs. Simpkins as a witness, they could have taken a deposition to preserve her testimony pursuant to the provisions of 18 U.S.C. 3503. In fact, this possiblity was considered but not acted upon. *Id.* at 50-51.

In any event, as the trial court concluded, Mrs. Simpkins' testimony would have been of no practical value to the defense. *Id.* at 59. It was not significant enough to establish a "reasonable pos-

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

---

sibility that the jury could have reached a different result by considering the asserted evidence foreclosed by delay." *Favors* v. *Eyman*, 466 F.2d 1325, 1328 (C.A. 9)); *Turner* v. *Slayton* (C.A. 4), No. 73-1027, February 7, 1974.